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Coverage B Conundrum: Do the Facts Alleged or the Elements of Liability Control Courts' Duty to Defend Analysis?

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It is well-settled that, in Wisconsin, an insurer's duty to defend arises whenever the factual allegations in the complaint raise a reasonable possibility of coverage. Yet in *West Bend Mutual Insurance Co. v. Ixthus Medical Supply, Inc.*, the Wisconsin Supreme Court explicitly evaluated the duty to defend based on the elements of liability to the exclusion of the factual allegations. 2019 WI 19 (Wis. 2019). The *West Bend* court's decision represents the latest departure from a practical, deeply-rooted framework for evaluating an insurer's duty to defend. This article examines the West Bend decision, cases in other jurisdictions reaching similar and different results, and provides the authors' views on guiding courts away from adopting *West Bend*'s flawed approach.

The *West Bend* Court Shifts Wisconsin Law and Evaluates the Duty to Defend Based on Elements of Liability

The *West Bend* coverage dispute arose from a lawsuit between Abbott Laboratories, its affiliates, and West Bend Insurance Company's named insured, Ixthus Medical Supply, Inc. In November 2015, Abbott sued Ixthus, among others, for trademark and trade dress infringement, fraud, and other common law and statutory violations. Abbott alleged that Ixthus illegally conspired to import and sell diverted international blood glucose test strips Abbott manufactured with labeling that had not been cleared by regulators for sale in the United States. This was, according to Abbott, part of a fraudulent scheme in which Ixthus knowingly participated. Abbott alleged thirteen causes of action, including Federal Trademark Dilution under Section 43(c) of the Lanham Act; 15 U.S.C. §1125(c), and claims under New York General Business Law §§360-1 and 349. Although some of the causes of action in the complaint required proof of intent, others, like those previously identified, did not.

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